



Arizona State Senate **Background Brief**

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ABORTION-PARENTAL CONSENT

CONSTITUTIONALITY OF RESTRICTIONS ON MINORS OBTAINING ABORTIONS

Brief Overview of United States Supreme Court Precedent

The United States Constitution places limits on a state's right to interfere with certain decisions about family and parenthood, including a woman's decision to terminate her pregnancy. However, the state may place restrictions on such decisions so long as it does not create an undue burden to the woman's ability to make the decision. *See generally Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877 (O'Connor, Kennedy, Souter, J.J.). Supreme Court precedent established that it is not unconstitutional for a state to require a minor seeking an abortion to obtain the consent of a parent or guardian for the abortion, provided that there is an adequate judicial bypass procedure. *Id.* at 899.

The Constitutional History of Arizona's Legislation Concerning Restrictions on Minors Obtaining Abortions

The Arizona Legislature first passed legislation in 1989 requiring parental consent before an abortion is performed, which was permanently unenforceable because the language regarding an abortion procedure was unconstitutionally vague and the definition of a medical emergency was unconstitutionally narrow. *Planned Parenthood of Southern Arizona v. Neely*, 804 F.Supp. 1210 (D.Ariz.1992).

After the U.S. Supreme Court made its findings in *Casey*, the Arizona Legislature, in 1996, again passed legislation concerning minors obtaining abortions. The Legislature attempted to rectify the unconstitutional 1989 statute by incorporating several provisions of the Pennsylvania abortion statute at issue in *Casey*. The Ninth Circuit Court of Appeals held that although the judicial bypass provision was not, standing on its own, unconstitutionally vague, several provisions of the legislation were not specific enough and therefore the statute was held unconstitutional.

Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022 (9th Cir. 1999).

Specifically, the court in *Lawall* found: 1) the judicial bypass provision of the parental consent statute directed the court to act promptly but lacked specific timeframes or deadlines at the trial court and appeal levels; 2) the medical emergency provision also failed to provide a deadline by which the bypass provision had to be decided, which hindered doctors from making necessary informed judgments; 3) an anonymous and expeditious alternative to parental consent was not provided; and 4) undue emphasis was placed on whether the performance of the abortion without parental consent would be in the minor's best interest. In summary, the court found that an alternative procedure to obtain consent must assure that resolution will be completed with sufficient expedition to allow an opportunity for an abortion to be obtained and that a doctor may perform an immediate abortion when necessary to avert significant health risks to the woman.

In order to rectify the unconstitutional 1996 statute, the Arizona Legislature passed legislation in 2000 incorporating a 48-hour timeframe within which a court must hold a hearing and issue a ruling, and stipulating that, if the petition is not heard within 48 hours, the abortion is deemed to be granted and the consent requirement is waived. The law also allows a minor to use a fictitious name and requires the judge to order confidential records of the information presented in the hearing to be maintained. Finally, the 2000 law allows abortions without either parental or court consent if the minor attests the pregnancy resulted from sexual conduct with a parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, foster parent or an unrelated male who is living with the minor's mother.

The 2000 legislation was upheld as constitutional by the Ninth Circuit Court of Appeals, and no legislation amending the statute has been enacted since that time. *See Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783 (9th Cir. 2002).

CURRENT ARIZONA LAW

A person may not perform an abortion on a pregnant unemancipated minor unless the physician has obtained written consent from one of the minor's parents, guardians or conservators, or unless a judge authorizes the physician to perform the abortion ("judicial bypass"). A.R.S. § 36-2152. Additionally, parental consent is not required if: 1) the pregnant minor attests that the pregnancy resulted from sexual contact with the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, foster parent or an unrelated male living with the mother and child or 2) the attending physician certifies that the abortion is necessary to avert death or irreversible impairment of major bodily function.

A minor may utilize the judicial bypass process to circumvent parental consent requirements by appearing before the superior court and demonstrating that she is mature and capable of giving informed consent. The Arizona Court of Appeals determined that a pregnant minor who seeks the judicial bypass bears the burden of proving entitlement to that finding by clear and convincing evidence. *In re B.S.*, 205 Ariz. 611, 74 P.3d 285 (App. 2003). In Arizona, the pregnant minor has a higher burden of proof than in other states with judicial bypass procedures. *See Recent Cases*, 117 Harv. L. Rev. 2785 (2004).

The court provided guidance for determining whether the minor is mature and capable of giving informed consent to the proposed abortion. Specifically, maturity may be measured by examining the minor's experience, perspective and judgment. *In re B.S.*, 205 Ariz. at 616, 74 P.3d at 290.

Experience refers to the minor's life experiences and the court could consider "the minor's age and experiences working outside the home, living away from home, traveling on her own, handling personal finances and making other significant decisions." *Id.*

Perspective is the minor's comprehension of the available options and each option's consequences. "[W]hen evaluating the minor's

perspective on her decision, the court could examine the steps she took to explore her options, and the extent to which she considered and weighed the potential consequences of each option.” *Id.* at 617, 291.

Finally, judgment “refers to the minor’s intellectual and emotional ability to make the abortion decision without the consent of her parents or guardian. To assess judgment, the court could consider the minor’s conduct since learning of her pregnancy and her intellectual ability to understand her options and make an informed decision.” *Id.*

CURRENT ISSUES WITH ABORTION AND PARENTAL CONSENT

Currently, 45 states require either parental consent or notification of a minor’s abortion. However, 9 of those 45 states’ laws are either temporarily or permanently enjoined by court order and the parental consent or notification policy is not in effect. In 2006, the United States Senate approved a bill, S. 403, criminalizing the transportation of a minor across state lines with the intent that the minor would obtain an abortion. The bill also allowed a parent who suffered harm from the transportation of the minor for the purpose of obtaining an abortion to request appropriate relief in a civil action. The legislation, however, was tabled in the United States House of Representatives.

ADDITIONAL RESOURCES

- The National Conference of State Legislatures (NCSL), Abortion Laws (updated August 24, 2006): <http://www.ncsl.org/programs/health/aborts.htm>
- NCSL, Reproductive Health Resources: <http://www.ncsl.org/programs/health/reproductive.htm>